BANK BUMIPUTRA (M) BHD.

v.

TECHNOLOGY & SYSTEMS DEVELOPMENT CORP. (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[SUIT NO. C 4326 OF 1984]
19 JULY 1989

CIVIL PROCEDURE: *Application to set aside judgment in default of defence - Allegation of forgery - Whether there were merits on the defence, disclosing an arguable and triable issue - Principles to be applied - Delay.*

This is an application by the 4th defendant to set aside judgment in default of defence entered against him by one plaintiff. The 4th defendant (as with the 2nd & 3rd defendants) was an alleged guarantor of an overdraft facility granted by the plaintiff to Technology Systems Development Corp. (1st defendant).

It was contended by the 1st defendant that his signature on the letter of guarantee dated 14 December 1989 was forged by the 2nd and 3rd defendant. Such a contention was supported by a statutory declaration, to that effect, made by the 2nd and 3rd defendant. The 4th defendants further averred that the 2nd and 3rd defendants persuaded him not to dispute the said letter of guarantee pending their efforts to settle the outstanding sum.

The plaintiff raised the issue of delay and alleged that this application was merely a manoeuvre by the defendants to avoid execution as the plaintiffs had commenced bankruptcy proceedings against the 4th defendant.

Held:

[1] The 4th defendant had adduced sufficient evidence on the affidavits to show that he has a *prima facie* defence on the merits and has raised an arguable and triable issue.

[2] Judgment in default of defence was set-aside and the 4th defendant was ordered to pay cost thrown away.

[Order accordingly.]

Cases referred to:

Mohamed Taib Haji Ibrahim & Anor. v. Perwira Habib Bank Malaysia Bhd. [1987] CLJ (Rep) 217
Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd. [1989] 1 CLJ (Rep) 32
Evans v. Bartlam [1973] AC 473
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23
Farden v. Richter [1989] 23 QBD 124
White v. Weston [1968] 2 QB 647 CA
L. Oppenheim and Company v. Mohamed Haneef [1992] 1 AC 482
Beale v. MacGregor [1886] 2 TLR 311

Other sources referred to:

Mallal's Supreme Court Practice, 2nd Edn., Vol. 1

For the 4th defendant/appellant - Izzat Haji Othman; M/s. Chua Brothers, Azzat & Xavier
For the plaintiff/respondent - J. Doshi; M/s. Tungku Zuhri, Manan & Abdullah

JUDGMENT

Gunn Chit Tuan J:

This was an application (encl. 6) by way of summons in chambers dated 29 October 1986, to set aside the judgment in default of defence entered against the 4th defendant on 10 April 1985. The said application was supported by an affidavit (encl. 5) affirmed by the 4th defendant on 23 October 1986.

The claim of the plaintiff against the 4th defendant was an alleged guarantor of an overdraft facility granted by the plaintiff to Technology & Systems Development Corporation (M) Sdn. Bhd. (the 1st defendant). It was the contention of the 4th defendant that his signature on a letter of guarantee dated 4 December 1982, was forged by the 2nd and 3rd defendants abovenamed. A copy of a statutory declaration (Exhibit ABC2 to encl. 5) made by the 2nd and 3rd defendants, who are directors of the 1st defendant, was exhibited and states clearly that "we hereby declare however that the guarantee given by letter of guarantee dated 4 December 1982 contains a forged signature of the director Ahmad bin Chik alias Ahmad bin Chee". It was further stated by the 4th defendant that the said forgery was made by the 2nd defendant. There was also exhibited a statutory declaration by the 2nd defendant (Exhibit ABC3) affirming that fact and stating that "the signature of Ahmad bin Chik alias Ahmad bin Chee contained therein were executed by me in forgery of the signature of the said Ahmad bin Chik alias Ahmad bin Chee".

It was also averred by the 4th defendant that the 2nd and 3rd defendants agreed to settle the outstanding sum with the plaintiff and 4th defendant was persuaded by them not to dispute the letter of guarantee signed by him pending their efforts to settle the matter. But there was eventually no settlement as the 2nd and 3rd defendants failed to comply with the terms agreed to by the plaintiff.

Mr. Izzat Haji Othman, Counsel for the 4th defendant referred to *Mohamed Taib Haji Ibrahim & Anor. v. Perwira Habib Bank Malaysia Bhd.* [1987] CLJ (Rep) 217 in which case the Supreme Court allowed an application to set aside a judgment in default of defence as the appellants had succeeded in raising several questions of law which merited mature consideration and therefore unconditional leave was given to the appellants to defend the action.

Counsel also referred to the following passages in the recent judgment of Lee Hun Hoe Chief Justice, Borneo, in *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 CLJ (Rep) 32, 33:

> We are unable to agree with the reasoning of the learned Judge. First, where an application is made for setting aside a judgment in default the learned Judge would have to consider the merits of the case.
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> ...
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> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the Court has an absolute discretion to set aside the judgment, if necessary, on term and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the Court should act in *Evans v. Bartlam* [1973] AC 473 at 480 in these words:
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> > ... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

In the instant case the learned Judge did not consider the judgment to be irregular. *Mallal's Supreme Court Practice*, 2nd Edn. Vol. I at p. 84 explains the position where the judgment is regular thus:

> The discretion will only be exercised if the affidavit supporting the application to set aside discloses fact showing a defence on the merits: or for some very sufficient reason: *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden v. Richter* [1989] 23 QBD 124.

A defence on the merits means merely raising only an arguable or triable issue, e.g. contributory negligence in a running down case in *White v. Weston* [1968] 2 QB 647 CA. A judgment in default is not a judgment on the merits: *L. Oppenheim And Company v. Mahomed Haneef* [1922] 1 AC 482.

As to delay there is no rigid rule that an application must satisfy the Court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously, the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. Clearly, the application should be made promptly and within a reasonable time. But the Court will in a fit case disregard lapse of time: *Beale v. MacGregor* [1886] 2 TLR 311.

Counsel submitted that forgery is a serious triable issue which could only be appropriately decided at a trail proper witnesses. The mere fact that the applicant did not challenge the writ earlier does not amount to an estoppel to bar the applicant from disputing the letter of guarantee in this case. He contended that the explanation given by the applicant in his affidavit supported by the exhibits was sufficient and justified the applicant's contention. The application, he contended, was not made as a last bid to evade liability and execution proceedings but merely to prevent an innocent party from being penalised.

In her submission in reply Miss. J. Doshi, Counsel for the plaintiff, stated that a writ of summons was served on M/s. Chua Brothers, Azzat & Xavier on 5 January 1985, and that it was surprising to note that the 4th defendant has raised forgery as a ground for setting aside the judgment some 21 months after the writ of summons was served on his solicitors. She pointed out that the 4th defendant has had the benefit of legal Counsel's advice even before legal proceeding were instituted by the plaintiff and he never raised the issue of forgery until the summons in chambers dated 29 October 1986, was filed. Time was granted by the plaintiff's solicitors to the defendants' solicitors to file a statement of defence and when no statement of defence was filed the plaintiff's solicitors issued the requisite 48 hours notice to the defendants' solicitors, and it was only after the expiration of the time granted by the plaintiff's solicitors that judgment in default of defence was entered on 16 April 1984. She contended that the 4th defendant has not explained his neglect and/or inadvertence in filing a defence within the time prescribed under the High Court Rules 1980, or within the extended time given before judgment was entered. All the defendants through their solicitors have never disputed liability and have further put forward proposals for settlement. Counsel further submitted that the 4th defendant has failed to show any reason why the time lapse should be disregarded. In the circumstances it was here contention that the 4th defendant's application to set aside the judgment was a last minute attempt to avoid execution as the plaintiff had commenced bankruptcy proceedings against him. She submitted that the 4th defendant's application should be dismissed.

Having heard this case twice, once in chambers and again in open Court, I was satisfied and considered that the 4th defendant had adduced sufficient evidence on affidavits to show that he has a *prima facie* defence on the merits and has raised an arguable or triable issue.

I therefore set aside my decision in chambers dated 16 February 1987, and in the exercise of the Court's discretion, also set aside the judgment in default of defence dated 16 April 1985 entered against the 4th defendant. The 4th defendant was ordered to pay the cost thrown away in chambers 16 February 1987, and in open Court in any event. Counsel for plaintiff requested for an early trial and as this suit was filed in November 1984, I considered that the plaintiff should be favoured with an early trial and so ordered one.

Also found at [1989] 2 CLJ 987